No. 16450

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW MOON CHEUNG,

Appellant,

vs.

WILLIAM P. ROGERS, as Attorney General of the United States, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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Jurisdiction.

The District Court had jurisdiction of appellant's action to be declared a national of the United States under the provisions of Section 360(a) of the Immigration and Nationality Act, 66 Stat. 73, 8 U. S. C. A. Section 1503(a). Its judgment [Tr. 24][1] being a final decision, this Court has jurisdiction of an appeal from such decision pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

Appellant alleged birth in China on January 28, 1936 [Tr. 1; R. 6], claiming to be the third of five sons born in

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[1]"Tr." indicates references to the typewritten Transcript of Record; "R." indicates references to the Reporter's Transcript of Proceedings. Exhibits will sometimes be abbreviated "Ex."

China to Lew Shung, his alleged father, and Chew Wai Ying, his alleged mother [Tr. 2; R. 6, 21-23, 43].

Appellant's alleged father was admitted to the United States as a citizen by the Immigration and Naturalization Service on January 25, 1922 [Tr. 9] and his citizenship is not being challenged. Appellant himself was admitted to the United States as a citizen on January 26, 1952 at Honolulu, Hawaii [Tr. 9] and on May 23, 1952 the United States Department of Justice issued to him Certificate of Citizenship No. AA 24951 [Tr. 10; Ex. 1].

By letter dated March 18, 1952 [Ex. H] addressed to the District Director, Immigration and Naturalization Service, Miss Kathleen Parker, who is now a Judge of the Municipal Court but who was then counsel for appellant's parents [R. 229-231], objected to the parents undergoing blood tests because of the expense, but in conclusion stated that:

> "Mr. and Mrs. Lew are quite willing to make a sacrifice and incur the additional expense if the Consul will accept a favorable result of the test as sufficient proof of paternity and will issue a travel document to his son, Lew Moon Chung[2] upon this additional evidence provided it is favorable."

By letter dated April 8, 1952 the American Consulate General, Hong Kong, B. C. C. advised Miss Parker that it was the intention of the Consulate in requesting blood tests of Mr. and Mrs. Lew to conclude its investigation in the case of Lew Moon Cheung (*sic*) and to issue travel documentation to him promptly if the results of the blood testing was favorable [Ex. I].

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[2]The alleged eldest brother of appellant [R. 43]. The two names are apparently spelled the same except for an "e" in appellant's name.

On April 29, 1952 appellant's alleged parents were given blood grouping tests at the United States Public Health Service, San Pedro, California, by Charles F. Butler, a medical or laboratory technician, in connection with the application of appellant's alleged brother, Lew Moon Chung to enter the United States [Ex. C-1; R. 180-185].

By letter dated May 7, 1952 [Ex. J] addressed to the American Consulate General, Hong Kong, B. C. C. Miss Parker stated that immediately upon receipt of the Consulate's letter of April 8, 1952:

> "arrangements were made with the Immigration and Naturalization Service for the blood tests which you requested and I have been advised by that Service that the results of the tests are being airmailed to your office."

On or about December 19, 1956 the Acting District Director Immigration and Naturalization Service entered an order cancelling plaintiff's Certificate of Citizenship No. AA 24951; and on or about March 25, 1957 this order was affirmed by the Acting Regional Commissioner, Southwest Region, Immigration and Naturalization Service [Tr. 7-8].

On April 18, 1957 appellant instituted an action in the court below, seeking a judgment declaring him to be a national of the United States [Tr. 1-6]. He claimed citizenship pursuant to Section 1993, Revised Statutes of the United States [Tr. 2]. On November 27, 1957 appellant was given a blood grouping test by Dr. Michael A. Rubinstein pursuant to order of the District Court [Tr. 22].

During trial appellant's parents testified that they submitted to the blood tests on April 29, 1952 involuntarily because they believed that they were required by law to do so [R. 181-182, 185]. The trial court admitted evidence

showing the results of the blood grouping tests given appellant [Ex. D; R. 103] as well as evidence showing the results of the blood grouping tests of appellant's alleged parents [R. 98, 254; Sub-exhibits A, B, C, D, E, and F of Interrogatories contained in Ex. C; Exs. E-1, E-2, E-3, F-1, F-2, F-3, and G].[3] These results, insofar as they are pertinent to the instant case, are:

Alleged father: Lew Shung	AB
Alleged mother: Chew Wai Ying	B
Appellant: Lew Moon Cheung	O

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[3]Exhibit C contains, among other things, the Interrogatories and Cross-Interrogatories propounded to Charles F. Butler. Attached to the Interrogatories as Sub-exhibits A, B, and C are photostats of forms relating to the blood grouping tests given to appellant's alleged father, Lew Shung ("Shung, Lew" on the forms). Attached to the Interrogatories as Sub-exhibits D, E, and F are photostats of forms relating to the blood grouping tests given to appellant's alleged mother, Chew Wai Ying ("Ying, Chew Wai" on the forms).

Exhibits E-1, E-2, and E-3 are forms from the records of the United States Public Health Service [R. 201] relating to blood grouping tests given to appellant's alleged father, Lew Shung.

Exhibits F-1, F-2, and F-3 are forms from the records of the United States Public Health Service [R. 202] relating to blood grouping tests given to appellant's alleged mother, Chew Wai Ying.

Exhibit G consists of ribbon copies of the results of the blood grouping tests for both of appellant's alleged parents mailed on May 1, 1952, to the Immigration and Naturalization Service. The Court will note that Sub-exhibits A, B, C, D, E, and F attached to the Interrogatories are photostats of Exhibits E-1, E-2, E-3 (without letter of transmittal), F-1, F-2, and F-3 (without letter of transmittal) respectively; and that Exhibit G consists of the ribbon and signed copies of the same documents of which both Exhibits E-3 and F-3 are composed.

Counsel for appellant did not object to the admission of Exhibit C into evidence [R. 98] although he thereafter moved to strike this exhibit [R. 154, 257-259]. No objection was interposed to the admission of Exhibits E-1, E-2, F-1, and F-2 [R. 254]. At first E-3 and F-3 were objected to only on the ground that they were carbons [R. 254], although later there was a vague reference to authentication [R. 255]. No objection was made to Exhibit G [R. 254], although there was later a vague reference to authentication [R. 255].

Exhibit E-1 was admitted [R. 254], although the Clerk of Court omitted to so mark it.

After trial the District Court filed its Memorandum of Opinion [Tr. 12-16] and entered its Findings of Fact, Conclusions of Law and Judgment [Tr. 20-24], finding, inter alia, that based upon the blood tests set forth above, appellant "cannot possibly be the child of his alleged father" [Finding of Facts VI and VII; Tr. 21-22] and denying the relief prayed for in appellant's Complaint [Tr. 24].

Questions Presented.

1. Did the District Court err in admitting in evidence results of the blood grouping tests given appellant's alleged parents on April 29, 1952?

2. Did the Government rebut appellant's *prima facie* case by clear, unequivocal, and convincing evidence?

Statutes Involved.

Section 360(a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U. S. C. A. Section 503(a) provides in pertinent part:

> "Sec. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, * * *"

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, provides in pertinent part:

> "SEC. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. * * *"

Title 28, United States Code, Section 1732(a) provides:

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, ocurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

ARGUMENT.

I.

The Results of the Blood Grouping Tests Given Appellant's Alleged Parents Were Properly Admitted in Evidence.

A. The Results of These Tests Were Admissible as Records Made in the Regular Course of Business.

Appellant contends that on April 29, 1952 it was not the usual course of business of the Public Health Service to take blood tests *at the request of the Immigration and Naturalization Service* (Br. 8). This contention, in the form advanced by appellant, even if sustained, would not render the results of the tests in the instant case inadmissible under the standards laid down in *Palmer v. Hoffman,* 318 U. S. 109 (1943), The particular agency for whom blood tests are performed would in no way affect their "probability of trustworthiness" (318 U. S. at pp. 113-114); and certainly the conduct of blood grouping tests is within the "inherent nature" (318 U. S. at p. 115) of a public health service.

In the case at bar, however, Mrs. Catherine Fay Wood, who at the time of trial had been registrar of the United States Public Health Service at San Pedro, California for ten years [R. 200-201], testified that it was the business of the Public Health Service in April, 1952 to take blood tests on behalf of the Immigration and Naturalization Service when requested; that blood test equipment had been available at the San Pedro office since about 1949; and that from that time on the office had been testing blood on behalf of agencies that requested it [R. 215-216, 218-219].

Mrs. Wood also identified Exhibits E-1, E-2, F-1, and F-2 as forms regularly used by the Public Health Service in San Pedro [R. 204-205, 209-210].[4] She identified the handwriting appearing on each of these exhibits [R. 205-206, 209-211] and described the purposes of the forms [R. 204-205, 209]. In addition, she described the procedure which was employed on April 29, 1952 for requesting and obtaining a blood test at the San Pedro United States Public Health Service [R. 206-207, 213-215, 220, 222-226].

Clearly on April 29, 1952 it was not only in the regular course of business of the United States Public Health Service at San Pedro to conduct blood tests generally and to record the results thereof, but also to do so when requested by the Immigration and Naturalization Service (Title 28, U. S. Code, Sec. 1732; *Washington Coca-Cola Bottling Works v. Tawney,* 233 F. 2d 353 (Dist. Col. Cir. 1956); *Medina v. Erickson,* 226 F. 2d 475, 482-483 (9th Cir. 1955), cert. den. 351 U. S. 910; *Wheeler v. United States,* 211 F. 2d 19 (Dist. Col. Cir. 1953), cert. den. 347 U. S. 1019; *Stegemann v. Miami Beach Boat Slips,* 213 F. 2d 561 (5th Cir. 1954)).

Appellant urges that Exhibits E-3 and F-3 which set forth the results of the blood tests are not sufficiently identified, since they do not bear any initials (Br. 9-10). However, Exhibits E-1, E-2, and E-3 all bear the name "Shung, Lew" and Exhibits F-1, F-2, and F-3 all bear the name "Ying, Chew Wai." Identity of person is pre-

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[4]The Court will note that Exhibits E-1, E-2, F-1, and F-2 are official forms and that Exhibits E-2 and F-2 (Standard Form 514-b) have printed on them under the heading "Check Exam. Requested," *inter alia,* the following: "Blood Type" and "RH Factor."

sumed from identity of name (*Stebbins v. Duncan,* 108 U. S. 32, 46-47 (1882)). This presumption is strengthened by the fact that the names of appellant's parents are not common, *and by the further fact that they admitted having taken a blood test at the United States Public Health Service at San Pedro, California on April 29, 1952* [R. 180, 184].

Moreover, Mr. Butler placed on Exhibits E-2 and F-2, the official form for recording the results of the tests, his initials, the date, and the phrase "see typed sheet" [R. 206, 210-211; Ex. C-1, pp. 2-4].[5] Mrs. Wood testified that the results of the blood tests were typed in this case because they were so long [R. 222] and there was too much to get on the "pink slip"[6] [R. 223-224]; and that the typed sheet in such cases was customarily stapled to the "pink slip" [R. 224]. It will not be presumed that an error was made in attaching the results of the blood tests of appellant's alleged parents. Rather, it will be presumed that Government personnel properly performed their duties (*United States v. Chemical Foundation,* 272 U. S. 1, 14-15 (1926); *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 381-382 (9th Cir. 1948), cert. den. 335 U. S. 853).

As further authentication the signature of Dr. Daniel Rose, the Deputy Medical Officer in Charge, was placed on the ribbon copies of the results of the blood tests on May 1, 1952 [Ex. G; R. 208].

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[5]Photostatic copies of Exhibits E-2 and F-2 were attached to the Interrogatories [Ex. C] as Sub-exhibits B and E respectively.

[6]The pink slips are Exhibits E-2 and F-2.

B. The Results of These Tests Were Admissible as Official Records.

While records of the results of the blood tests of appellant's alleged parents may not be within the scope of Title 28, United States Code, Section 1733 (*Hartzog v. United States,* 217 F. 2d 706 (4th Cir. 1954); but see *Desimone v. United States,* 227 F. 2d 864 (9th Cir. 1955); and compare *Southard v. United States,* 218 F. 2d 943 (9th Cir. 1955)); Exhibits E-1, E-2, E-3, F-1, F-2, and F-3 are clearly official records within the meaning of Rule 44, Federal Rules of Civil Procedure (*United States v. Conti,* 119 F. 2d 652, 656 (1st Cir. 1941); 5 Moore's Federal Practice Secs. 44.02 and 44.03).[7]

Instead of offering duly authenticated copies under seal as provided for in Rule 44(a), the appellees presented the original records authenticated by the testimony of Mrs. Wood, the custodian of the records, [R. 204-206, 209-211]. Appellees also presented the testimony of Mr. Butler, *the person who conducted the blood grouping tests and prepared the record of the results,* who authenticated photostatic copies of the records [Ex. C-1].[8] This is sufficient to render them admissible (*Brenci v. United States,* 175 F. 2d 90 (1st Cir. 1949)).

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[7]In 5 Moore's Federal Practice, Section 44.02, the author states (p. 1515):

> ". . . If a paper represents work done by a person in the employment of the government in the course of the performance of the duties of his position, it is 'official.'"

[8]The qualification in the witness's answers to questions as to whether he prepared Sub-exhibits C and F attached to the Interrogatories: (Yes, assuming that Exhibit C is the original attachment to Exhibit B" [Ex. C-1, p. 3]; "Yes, assuming that the Exhibit F is the original attachment to Exhibit E" [Ex. C-1, p. 4]) is of little significance. The witness was merely being careful since he was testifying from a photostat rather than the original typed copy.

C. Appellant's Alleged Parents Voluntarily Submitted to These Tests.

From correspondence between Miss Parker, who at the time represented appellant's alleged parents as counsel [R. 230-231], the Immigration and Naturalization Service, and the American Consulate General at Hong Kong [Exs. H, I, and J], it is clear that appellant's parents voluntarily submitted to the blood grouping tests given them on April 29, 1952 in order to facilitate the entry of appellant's alleged brother into the United States. Appellant's parents admitted that they submitted to the tests in connection with the application of appellant's alleged brother to come to the United States [R. 181-184]; but claimed that they did so involuntarily because they believed that they were required by law to submit to the tests [R. 181-182, 185]. The District Court did not accept their testimony[9]; and it was not required to do so, even though such testimony may have been unimpeached or not directly contradicted (*Quock Ting v. United States,* 140 U. S. 417, 420 (1891); *Wong Sho Ging v. Brownell,* 218 F. 2d 910 (9th Cir. 1955); *Mar Gong v. Brownell,* 209 F. 2d 448, 449 (9th Cir. 1954); *N. L. R. B. v. Howell Chevrolet Co.,* 204 F. 2d 79, 86 (9th Cir. 1953), affirmed *sub nom Howell Chevrolet Co. v. N. L. R. B.,* 346 U. S. 482).

Moreover, the Supreme Court held in the case of *Breithaupt v. Abram,* 352 U. S. 432 (1957) that the withdrawal of blood by a skilled technician, *even without consent,* is not violative of any constitutional right. In the

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[9]In its Memorandum of Opinion the Court below declared [Tr. 16]:

> "From the evidence before it, the court believes the plaintiff's alleged parents voluntarily submitted themselves for blood group testing without protest on behalf of the claimed brother."

See also Finding of Fact VIII [Tr. 22].

absence of some valid constitutional objection, all relevant evidence will be considered by the Court, no matter how obtained (*Olmstead v. United States,* 277 U. S. 438, 466-469 (1927); *Joon Sui Noon v. United States,* 76 F. 2d 249 (8th Cir. 1935); *United States v. Lee Hee,* 60 F. 2d 924 (2d Cir. 1932); *United States v. Wainer,* 49 F. 2d 789 (W. D. Pa. 1931); *In re Dooley,* 42 F. 2d 562 (S. D. N. Y. 1930)).

II.

The Government Rebutted Appellant's Prima Facie Case by Clear, Unequivocal, and Convincing Evidence.

A. The Blood Grouping Tests Made of Appellant's Alleged Parents Were Reliable.

Appellant's attack upon the qualifications of Charles F. Butler to perform the blood grouping tests of appellant's alleged parents is without merit. Mr. Butler was a medical technician and at the time of his deposition upon written Interrogatories [Exs. C, C-1, and C-2] had been so employed for twenty-two years [Ex. C-1, pp. 1-2]. He received training in the conduct of blood tests at the National Institute of Health and in the United States Army [Ex. C-1, p. 2]. On April 29, 1952 Mr. Butler had had eight years experience in conducting blood tests and had made about 5000 agglutination tests.[10]

The Court will note that blood tests of the A-B-O system are decisive in the instant case [Tr. 22]. This system

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[10]The fact that Mr. Butler did not hold a license as a laboratory technician would seem to be unimportant in view of his many years of experience and his civil service position.

was the earliest to be discovered,[11] and is used in classifying blood for transfusions (see, Wiener, "Blood Groups and Transfusion," 3d Ed., Chap. IV).

Dr. Michael A. Rubinstein, whose qualifications as an expert hematologist are unimpeachable [R. 99-102] compared testing in the A-B-O system and other systems as follows [R. 116]:

> "The performance of AB testing is *most reliable* and the conclusions drawn from this test are more reliable as compared to other blood testing, the reason being that the *technique is simple, doesn't require any special training as compared to other testing,* as, for example, M and N and H groups, and also because the serum, *the testing seras available for this blood group testing are more reliable* and are not subject to deterioration as other blood testing sera are."

With respect to the qualifications of a technician to conduct blood grouping tests of the A-B-O system, Dr. Rubinstein said [R. 117]:

> "Usually in big hospitals where the life and welfare of patients depends upon the accuracy of testing and blood transfusion matters and so on, *we rely in AB and O testing entirely on qualified technicians* and we do not require a hematologist to do the test because, for the reasons as I said, *they are reliable and simple and accurate tests.*

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[11]The discovery of the A-B-O blood grouping system was reported by Dr. Karl Landsteiner in 1901. The M-N system was discovered by Landsteiner and Levine in 1927. Drs. Landsteiner and Wiener announced the discovery of the Rh factor in January, 1940 (see Schatkin, "Disputed Paternity Proceedings," 3d Ed., pp. 164, 166-167, 171). As of 1952 more than eight independent blood group systems had been identified (see "Medicolegal Application of Blood Grouping Tests," The Journal of the American Medical Association, June 14, 1952, Vol. 149, pp. 699-706).

The Court: Then is it your opinion a technician who has only had experience in a laboratory over a period of years could be qualified to take a blood test like this?

The Witness: A bood test for A and B and O, yes. Any certified technician, all technologists will be entrusted with such tests, and I will accept such tests reported by a qualified and certified technologist.

The Court: We can rely upon the results?

The Witness: Yes. In this testing of A, B, and O. With RH, I woud like to do it myself." (Emphasis added.)

The Court will also note that the crucial result obtained by Mr. Butler was the blood type of appellant's alleged father: AB.[12] Where an AB result is obtained, there is no necessity to recheck because there is a positive result as to the presence of both A and B factors; whereas, if a negative result is obtained, such as type O, which indicates an absence of both A and B factors, rechecking is necessary "because there may be cases where A and B are very weak or the serum is not potent enough to demonstrate the presence of A and B" [R. 121-122]. But where positive results as to both A and B are obtained, the potency of the serum is unimportant; since if positive results are obtained where the serum is weak, the proof is even stronger that the person is of type AB [R. 122-123].

The testimony of Dr. Rubinstein as to the reliability and simplicity of the A-B-O tests and the qualifications of

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[12]Since, as will be hereafter more fully discussed, a parent with blood type AB cannot have a child of type O, the results of the test of appellant's alleged mother is immaterial.

a laboratory technician to perform them is almost identical with that of Dr. Alexander S. Wiener in *Matter of D-W-O and D-W-H,* 5 I & N Dec. 351. As mentioned above (Footnote 11) Dr. Weiner is co-discoverer of the Rh factor, and is indisputably one of the leading hematologists in the United States. The following quotations are illustrative [5 I & N Dec. pp. 360-361]:

> "Dr. Wiener testified that A-B-O, M-N and Rh blood systems are completely separate, independent, unrelated blood group systems, that there are a number of others (described in Ex. B-2), but that the less known systems have not yet any practical medicolegal significance. He testified that *it is immaterial whether parentage is disproved by one, two or all three blood tests, that any of the three tests is equally valid in disproving parentage.* * * *"
>
> "Dr. Wiener testified that *an ordinary hospital technician, qualified to perform A-B-O tests for transfusion purposes is competent to perform A-B-O tests for all purposes.* He testified that he has *no reason to doubt that the United States Public Health Service technician who made the blood grouping tests in this case to be competent to determine A-B-O classifications.* He does doubt that this same technician is competent to perform M-N tests, because an M-N test to be reliable should be performed only by persons who do those tests frequently and regularly. * * *
>
> "* * * Dr. Wiener testified that the only discrepancies or errors he has found in the United States Public Health Service tests have involved M-N tests and *never A-B-O tests.*" (Emphasis added.) * * *
>
> "* * * He stated that the fact that the person makes an error in an M-N test does not necessarily

> shake confidence in his A-B-O tests, that errors in M-N tests are to be anticipated, because of the nature of the tests. He stated that *there is hardly any mechanical difficulty in making A-B-O tests,* that potent serums for this test are readily available on the open market and, if produced by one of the recognized serum producing firms, are certified by the National Institute of Health." (Emphasis added.)

Appellant relies upon rules for the conduct of blood tests set forth in various articles and texts (Br. 17-18, 20-21). These rules, while useful as general guides, do not distinguish between the various systems of blood tests and the relative difficulty of performing each of them, as did Drs. Rubinstein and Wiener. Nor do the authorities relied upon by appellant differentiate between positive and negative results. The crucial question is not whether general guides for the conduct of all systems of blood tests were complied with, but *whether the particular tests here involved were reliably conducted.*

Irrespective of whether an unfavorable inference may be drawn against appellant because he failed to offer any evidence to disprove the results of the tests offered by the Government (see, *Matter of D-W-O and D-W-H, supra,* cited with approval by this Court in *Et Min Ng v. Brownell,* 258 F. 2d 304 (9th Cir. 1958) at p. 308 (footnote 9), the blood grouping tests performed by Mr. Butler were clearly reliable, rendering such an inference unnecessary. This reliability is reinforced by the presumption of regularity in favor of the accuracy of blood tests in the absence of evidence that such tests call for unusual medical skill to make or interpret (*Wong Fuey Ying v. Dulles,* 137 Fed. Supp. 470, 472 (D. C. Mass. 1956)).

B. Appellant Cannot Possibly Be the Child of His Alleged Father.

The pertinent results of the blood grouping tests of appellant and his alleged parents are as follows:

Alleged father:	Lew Shung	AB
Alleged mother:	Chew Wai Ying	B
Appellant:	Lew Moon Cheung	O

Based upon the foregoing results Dr. Rubinstein testified that it was impossibe for appellant to be the child of his alleged father [R. 112-115]. His reasons were concisely summarized as follows [R. 115]:

> ". . . a person of Group O *cannot* be a blood child of a person of Group AB, and if one of the parents is AB, it cannot be the blood child of this couple." (Emphasis added.)

The above rule is universally recognized by all medical authorities (see, for example, "Medicolegal Application of Blood Grouping Tests," *supra*; Schatkin, "Disputed Paternity Proceedings," *supra,* at p. 168). In "Medicolegal Application of Blood Grouping Tests," *supra,* it is unequivocally declared:

> ". . . A parent with blood of group AB *cannot* have a child with blood of group O, and a parent of group O cannot have a child of group AB." (Emphasis added.)

Blood grouping tests of the A-B-O system excluding paternity shoud be given conclusive weight. As the Commissioners on Uniform State Laws said in their Prefatory Note to the Uniform Act on Blood Tests to Determine Paternity (see, 9 Uniform Laws Annotated, 1955 Cumulative Annual Pocket Part, pp. 13-14):

> "As to the make-up of the blood, the testing process is reasonably simple. *It is practically the same*

> *thing in which the 11 million or more men were tested in determining blood types in the service. It is the same kind of test made of the blood of donors to the Red Cross and hospital blood banks. Consequently, this is one of the few classes of cases in which judgment of court may be absolutely right by use of science.* In this kind of a situation it seems intolerable for a court to permit an opposite result to be reached when the judgment may scientifically be one of complete accuracy. *For a court to permit the establishment of paternity in cases where it is scientifically impossible to arrive at that result would seem to be a great travesty on justice.* * * *" (Emphasis added.)

And in Schatkin, "Disputed Paternity Proceedings," *supra,* the author declares (p. 234):

> "As far as the accuracy, reliability, dependability—even infallibility—of the test are concerned, there is no longer any controversy. *The result of the test is universally accepted by distinguished scientific and medical authority.* There is, in fact, no living authority of repute, medical or legal, who may be cited adversely." (Emphasis added.)

The California decisions holding blood tests excluding paternity not to be conclusive (*Arais v. Kalensnikoff,* 10 Cal. 2d 428, 74 P. 2d 1043, 115 A. L. R. 163; *Berry v. Chaplin,* 74 Cal. App. 2d 652, 169 P. 2d 442) have been severely criticized by both courts and legal writers (*Gilpin v. Gilpin,* 94 N. Y. S. 2d 706, 709, 197 Misc. Rep. 319, 322 (1950); Schatkin, "Disputed Paternity Proceedings," *supra,* at pp. 250-263; Britt, "Blood-Grouping Tests and More 'Cultural Lag'" 22 Minn. L. Rev. 836, 837 (1938); Note, 39 Calif. L. Rev. 277 (1951)). And other courts

have long held blood grouping tests excluding paternity to be conclusive (*Jordan v. Mace,* 144 Me. 351, 69 A. 2d 670 (1949); *Saks v. Saks,* 71 N. Y. S. 2d 797, 189 Misc. 667 (1947); *Cuneo v. Cuneo,* 96 N. Y. S. 2d 899, 198 Misc. Rep. 240 (1950); *Cortese v. Cortese,* 10 N. Y. Supp. 152, 76 A. 2d 17 (1950); *Clark v. Rysedorph,* 118 N. Y. S. 2d 103, 281 App. Div. 121 (1952); *Ross v. Marx,* 90 A. 2d 545, 21 N. J. Super. 95; See also: "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence," 16 So. Cal. L. Rev. 161; Note: 34 Cornell L. Q. 72 (1948); Note, 26 Calif. L. Rev. 456 (1938)).

Appellant relies upon the California indisputable presumption of legitimacy to overcome the results of the blood grouping tests (Cal. Code Civ. Proc., Sec. 1962.5; Br. 24). This presumption manifestly has no application to a decision determining whether a child born abroad acquired citizenship under a federal statute. The doctrine enunciated in *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), 114 A. L. R. 1487, that a federal court will apply the substantive law of the state wherein it sits (see also, *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941); *Guaranty Trust Co. v. York,* 326 U. S. 99 (1940)) has generally been limited to cases arising out of diversity of citizenship; and in the interpretation and application of federal statutes, such as the statute here involved federal rather than local law governs. (*United States v. Standard Oil Co.,* 332 U. S. 301 (1947); *Holmberg v. Armbrecht,* 327 U. S. 392 (1946); *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1943); *Wragg v. Federal Land Bank,* 317 U. S. 325, 328-329 (1943); *Sola Electric Co. v. Jefferson Co.* 317 U. S. 173, 176 (1942); *D'oench, Duhme & Co. v. F. D. I. C.,* 315 U. S.

447, 455-456 (1942); *Board of Comm'rs v. United States,* 308 U. S. 343 (1939); *United States v. Matthews,* 244 F. 2d 626 (9th Cir. 1957).) Similarly, federal law should govern the weight to be accorded blood tests excluding paternity.[13] It would be an anomaly if a child born abroad woud be able to establish his United States citizenship in a state where blood tests excluding paternity are not conclusive, while not being able to do so in a state where such tests are given conclusive effect.

Moreover, it is doubtful that the California indisputable presumption is applicable to a child *not born in California.* Certainly, it does not apply to a child born abroad claiming American citizenship; for generally in such cases there is testimony that the purported father and mother cohabited. The question in these cases is not one of legitimacy but of identity (*Matter of L-C-S,* 6 I & N Dec. 212 (July 19, 1954)).

C. The District Court Was Satisfied That Appellant's Prima Facie Case Had Been Rebutted by Clear, Convincing, and Unequivocal Evidence.

Appellant relies upon the recent decision of this Court in *Lee Hong Lung v. Dulles,* 261 F. 2d 719 (9th Cir. 1958), holding that where a person, over a long period of years, had acted in reliance upon the decision of a Board of Special Inquiry admitting him as a citizen of the United States; fraud or error which would warrant disregard of such decision must be established by evidence which is

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[13]In *United States v. Shaughnessy,* 220 F. 2d 537 (2d Cir., 1955), *cert. den.* 350 U. S. 847; and *Lue Chow Kon v. Brownell,* 220 F. 2d 187 (2d Cir., 1955), holding blood tests excluding paternity conclusive under New York law, the conflict of laws question was not discussed.

clear, unequivocal, and convincing.[14] This decision is of no aid to appellant because the trial court was satisfied that appellant's *prima facie* case had been rebutted beyond any doubt.

While the findings[15] of the court below do not explicitly set forth the standard of proof which it required, its Memorandum of Opinion does so. An appellate court may resort to an oral or written opinion for certain purposes (*Loeb v. Columbia Township Trustees,* 179 U. S. 472, 481-485 (1950); *In re Forstner Chain Corporation,* 177 F. 2d 572, 578, footnote 2 (1st Cir. 1949)); and this Court in similar cases has considered opinions to determine whether the trial court in making its findings did so in reliance upon considerations which should have carried no weight in the particular case (*Mar. Gong v. Brownell,* 209 F. 2d 448, 450 (9th Cir. 1950)) *and to determine the standard of proof applied by the District Court* (*Ly Shew v. Dulles,* 219 F. 2d 413, 416 (9th Cir. 1954)).

In the case at bar the standard of proof applied by the Court below is clearly set forth in its opinion [Tr. 18]:

> "* * * *If there were any doubt whatsoever in the court's mind that these tests were unreliable the court would disregard the tests,* but the court is of the

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[14]More than thirty-three years elapsed between the date Lee Hong Lung was admitted by a Board of Special Inquiry on January 7, 1924, and the date his citizenship was challenged in April, 1957 (261 F. 2d at p. 720); while less than five years elapsed between the date appellant was first admitted to the United States as a citizen on January 26, 1952 [Tr. 9], and the date his citizenship was first challenged on September 17, 1956 [Tr. 7]. Appellees will nevertheless assume that the "clear, convincing, and unequivocal" evidence rule applies to the instant case.

[15]The present judgment was entered on November 4, 1958, before this Court rendered the *Lee Hon Lung* decision on November 10, 1958.

opinion the tests were reliably and carefully conducted; that the plaintiff has it within his power to establish a different finding if one could be so established; that plaintiff's failure and the failure and refusal of his alleged parents to submit themselves for comparison blood grouping tests serves only to establish the fact that new tests would substantiate *the fact already established—that plaintiff cannot possible (sic) be the son of these claimed parents.* It appears to the court that the science of blood grouping has advanced so far that *it can be relied upon to establish impossibility of paternity."* (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judment of the District Court should be affirmed.

Respectfully submitted,

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